Vignesh Naidu a/l Kuppusamy Naidu v Prema Bonanza Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCVC)-880–04 OF 2021 AND W-01(IM)(NCVC)-881–04 OF 2021
YAACOB MD SAM, VAZEER ALAM MYDIN AND MOHD NAZLAN JJCA
23 JANUARY 2023

Contract — Sale and purchase of property — Liquidated damages — Prior to signing agreements for sale of condominium units to buyers developer obtained consent of Controller of Housing to extend time for completion of units and common property to 54 months from the statutorily-specified 36 months — Extension of time was granted under reg 11(3) of Housing Development (Control and Licensing) Regulations 1989 ('Regulations') — Federal Court ('FC') declared such extension of time null and void — Whether FC's decision operated retrospectively — Whether Housing Controller's void act could not be legitimised by way of estoppel, waiver or agreement between parties — Whether buyer was entitled to sue developer for late delivery of vacant possession and late completion of common facilities based on 36-months completion date specified in statutory contract of sale in Schedule H of Regulations — Whether High Court should not have struck out buyer's suit for being 'obviously unsustainable'

The appellant entered into a sale and purchase agreement ('SPA') to buy a condominium unit from the respondent developer. The SPA followed the format of the statutory SPA prescribed under Schedule H of the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations') made pursuant to the Housing Development (Control and Licensing) Act 1966 ('the HDA'). The statutory SPA required the respondent to hand over vacant possession of the condominium unit to the appellant and also complete construction of the common facilities within 36 months from the date of the SPA failing which it was liable to pay the appellant liquidated damages. However, prior to the respondent signing the SPA with the appellant and other buyers, it had obtained approval from the Housing Ministry's Controller of Housing under reg 11(3) of the Regulations to extend the statutory 36-months completion period to 54 months. Thus, when the appellant and the other buyers signed their respective SPAs with the respondent, they were fully aware that the completion date was 54 months from the dates of the SPA and not 36 months. Despite that, the appellant, about three and a half years after taking vacant possession of his unit sued the respondent for RM392,021.92 in liquidated and ascertained damages for late delivery of vacant possession based

on the 36-months completion date specified in the statutory SPA in Schedule H. The appellant applied for summary judgment of the said amount under O 14 of the Rules of Court 2012 ('the ROC'). The respondent reacted by applying for the suit to be struck out under O 18 r 19 of the ROC. The High Court judge, after hearing the two applications together, dismissed the summary judgment application and allowed the application to strike out. The instant appeals were against the two decisions.

Held, unanimously allowing both the appeals, setting aside the High Court's decision, allowing the summary judgment application and dismissing the respondent's striking out application:

(1) No triable issues were raised by the respondent for the court to deny the appellant's summary judgment application whilst the appellant's suit was certainly not an obviously unsustainable one to warrant it to be struck out summarily under O 18 r 19 of the ROC (see para 62).

(2) The Federal Court in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 ('Ang Ming Lee') held that reg 11(3) of the Regulations which conferred on the Housing Controller the power to waive or modify any provisions in the statutory contract of sale in Schedule H of the Regulations was ultra vires its enabling legislation, namely, the HDA. The Housing Controller thus had no power to waive or modify the 36-months period stipulated in the statutory contract of sale (see para 14).

(3) It mattered not whether the extension of time granted by the Housing Controller was after (as in *Ang Ming Lee*) or before (like in the instant case) the SPAs were signed between the developer and the buyers. As reg 11(3) was ultra vires, the Housing Controller simply had no power to give the extension of time or to amend the statutory contract at any time. Thus, the amendments made to cll 25 and 27 of the statutory SPA in Schedule H to substitute 36 months with 54 months pursuant to the Housing Controller's decision were also void and of no effect (see paras 21–22).

(4) Since the Federal Court in *Ang Ming Lee* did not pronounce expressly or by implication that its decision was to have prospective effect only, its ruling with regard to reg 11(3) applied retrospectively. It was not for any other court, more so one inferior in status to the Federal Court, to declare whether the decision in Ang Ming Lee should apply prospectively or otherwise (see paras 56–57 & 60).

(5) An ultra vires act, such as the extension granted by the Housing Controller under reg 11(3), could not be legitimised through estoppel, waiver or agreement between the parties. The doctrine of estoppel did

not apply against a statute or statutory agreement such as in the instant case which revolved around the clauses in a statutory contract as prescribed in Schedule H of the Regulations. Allowing estoppel or waiver to apply would defeat the very purpose of the HDA which was a social legislation enacted to control housing development and protect the interests of house buyers (see paras 26 & 28).

(6) The appellant's action was not time-barred as his right to claim for liquidated and ascertained damages ('LAD') only arose on the date he accepted delivery of vacant possession of his property, as stated in cl 25(2) of the SPA, which was in early February 2017. Since the six-year limitation period under the Limitation Act 1953 would only expire in early February 2023 and the appellant had filed his suit in August 2020, the suit was clearly not barred by limitation (see paras 29–31).

(7) There was no merit to the respondent's argument that the appellant should have filed a judicial review application instead of a writ action. Although the appellant was questioning the validity of the extension of time granted by the Housing Controller under reg 11(3), which was an administrative decision which fell within the remit of public law, the Federal Court in *Ang Ming Lee* had declared that that decision by the Controller was null and void. The appellant was not seeking any reliefs against the Minister or the Housing Controller or to quash the extension decision by way of certiorari in a judicial review since a void decision was no decision at all. There was no decision to challenge. The extension could be disregarded without the need for any judicial review proceedings to have it set aside. The appellant's pleaded case was essentially concerned with the contractual breach of the SPA, the validity of cll 25 and 27 thereof and the respondent's obligation to pay LAD for failing to deliver vacant possession and complete the common facilities within the timeframe prescribed under the law (see paras 41–44).

[Bahasa Malaysia summary

Perayu telah memasuki perjanjian jual beli ('PJB') untuk membeli unit kondominium daripada pemaju responden. PJB mengikut format PJB statutori yang ditetapkan di bawah Jadual H Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 ('Peraturan tersebut') yang dibuat menurut Akta Pemajan Perumahan (Kawalan dan Pelesenan) 1966 ('APP'). PJB statutory tersebut memerlukan responden menyerahkan milikan kosong unit kondominium tersebut kepada perayu dan juga menyiapkan pembinaan kemudahan bersama dalam tempoh 36 bulan dari tarikh PJB sekiranya gagal ia bertanggungjawab untuk membayar ganti rugi tertentu dan ditetapkan kepada perayu. Bagaimanapun, sebelum responden menandatangani PJB dengan perayu dan pembeli lain, ia telah mendapat kelulusan daripada Pengawal Perumahan Kementerian Perumahan di bawah peraturan 11(3) Peraturan untuk melanjutkan tempoh penyiapan 36 bulan statutori kepada 54 bulan.

Oleh itu, apabila perayu dan pembeli lain menandatangani PJB masing-masing dengan responden, mereka sedar sepenuhnya bahawa tarikh siap adalah 54 bulan dari tarikh PJB dan bukannya 36 bulan. Walaupun begitu, perayu, kira-kira 3 setengah tahun selepas mengambil milikan kosong unitnya menyaman responden sebanyak RM392,021.92 sebagai ganti rugi tertentu dan ditetapkan untuk penghantaran lewat milikan kosong berdasarkan tarikh penyiapan 36 bulan yang dinyatakan dalam PJB statutory dalam Jadual H. Perayu memohon penghakiman ringkas amaun tersebut di bawah A 14 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Responden bertindak balas dengan memohon supaya saman tersebut dibatalkan di bawah A 18 k 19 KKM. Hakim Mahkamah Tinggi, selepas mendengar kedua-dua permohonan tersebut bersama-sama, menolak permohonan penghakiman ringkas dan membenarkan permohonan tersebut dibatalkan. Rayuan semasa adalah terhadap kedua-dua keputusan itu.

Diputuskan, sebulat suara membenarkan kedua-dua rayuan tersebut, mengenepikan keputusan Mahkamah Tinggi, membenarkan permohonan penghakiman ringkas dan menolak permohonan pembatalan responden:

(1) Tiada isu yang boleh dibicarakan dibangkitkan oleh responden untuk Mahkamah menolak permohonan penghakiman ringkas perayu manakala saman perayu pastinya bukanlah satu yang jelas tidak dapat dipertahankan untuk mewajarkannya dibatalkan secara ringkas di bawah A 18 k 19 KKM (lihat perenggan 62).

(2) Mahkamah Persekutuan dalam *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 ('Ang Ming Lee') memutuskan bahawa peraturan 11(3) Peraturan yang memberikan kuasa kepada Pengawal Perumahan untuk mengetepikan atau mengubah suai mana-mana peruntukan dalam kontrak jualan berkanun dalam Jadual H Peraturan adalah ultra vires perundangan yang membolehkannya, iaitu APP. Oleh itu, Pengawal Perumahan tidak mempunyai kuasa untuk mengetepikan atau mengubah suai tempoh 36 bulan yang ditetapkan dalam kontrak jualan berkanun (lihat perenggan 14).

(3) Tidak kira sama ada lanjutan masa yang diberikan oleh Pengawal Perumahan adalah selepas (seperti dalam *Ang Ming Lee*) atau sebelum (seperti dalam kes semasa) PJB ditandatangani antara pemaju dan pembeli. Memandangkan peraturan 11(3) adalah ultra vires, Pengawal Perumahan tidak mempunyai kuasa untuk memberikan lanjutan masa atau meminda kontrak statutori pada bila-bila masa. Oleh itu, pindaan yang dibuat kepada klausa 25 dan 27 PJB berkanun dalam Jadual H untuk menggantikan 36 bulan dengan 54 bulan menurut keputusan Pengawal Perumahan juga tidak sah dan tidak dapat dikuat kuasa (lihat perenggan 21–22).

(4) Memandangkan Mahkamah Persekutuan dalam *Ang Ming Lee* tidak menyatakan secara nyata atau secara implikasi bahawa keputusannya adalah untuk mempunyai kesan prospektif sahaja, keputusannya berkenaan dengan peraturan 11(3) digunakan secara retrospektif. Ia bukan untuk mana-mana mahkamah lain, lebih-lebih lagi yang lebih rendah statusnya daripada Mahkamah Persekutuan, untuk mengisytiharkan sama ada keputusan dalam *Ang Ming Lee* patut digunakan secara prospektif atau sebaliknya (lihat perenggan 56–57 & 60).

(5) Tindakan ultra vires, seperti lanjutan yang diberikan oleh Pengawal Perumahan di bawah peraturan 11(3), tidak boleh disahkan melalui estoppel, penepian atau perjanjian antara pihak-pihak. Doktrin estoppel tidak terpakai terhadap statut atau perjanjian berkanun seperti dalam kes semasa yang berkisar tentang klausa dalam kontrak statutori seperti yang ditetapkan dalam Jadual H Peraturan tersebut. Membenarkan estoppel atau penepian untuk digunapakai akan menggagalkan tujuan APP yang merupakan perundangan sosial yang digubal untuk mengawal pembangunan perumahan dan melindungi kepentingan pembeli rumah (lihat perenggan 26 & 28).

(6) Tindakan perayu tidak disekat masa kerana haknya untuk menuntut ganti rugi tertentu dan ditetapkan ('LAD') hanya timbul pada tarikh beliau menerima penyerahan milikan kosong hartanya, seperti yang dinyatakan dalam klausa 25(2) PJB, iaitu pada awal Februari 2017. Memandangkan tempoh had enam tahun di bawah Akta Had Masa 1953 hanya akan tamat pada awal Februari 2023 dan perayu telah memfailkan samannya pada Ogos 2020, saman tersebut jelas tidak dihalang oleh had masa (lihat perenggan 29–31).

(7) Tiada merit kepada hujah responden bahawa perayu sepatutnya memfailkan permohonan semakan kehakiman dan bukannya tindakan writ. Walaupun perayu mempersoalkan kesahihan lanjutan masa yang diberikan oleh Pengawal Perumahan di bawah peraturan 11(3), yang merupakan keputusan pentadbiran yang terletak di bawah bidang kuasa undang-undang awam, Mahkamah Persekutuan dalam *Ang Ming Lee* telah mengisytiharkan bahawa keputusan tersebut oleh Pengawal adalah batal dan tidak sah. Perayu tidak memohon sebarang relif terhadap Menteri atau Pengawal Perumahan atau membatalkan keputusan lanjutan secara certiorari dalam semakan kehakiman memandangkan keputusan terbatal bukanlah keputusan sama sekali. Tiada keputusan untuk dicabar. Pelanjutan tersebut boleh diabaikan tanpa memerlukan sebarang prosiding semakan kehakiman untuk mengetepikannya. Kes yangd diplidkan perayu pada asasnya adalah berkenaan dengan pelanggaran kontrak PJB, kesahihan klausa 25 dan 27 dan kewajipan responden untuk membayar LAD kerana gagal menyerahkan milikan

kosong dan melengkapkan kemudahan am dalam tempoh masa yang ditetapkan di bawah undang-undang (lihat perenggan 41–44).]

Cases referred to

Abdillah bin Labo Khan v PP [2002] 3 MLJ 298, CA (refd)
Alpine Return Sdn Bhd v Ng Hock Sing & Ors [2021] MLJU 1923; [2022] 1 CLJ 120, HC (folld)
Alvin Leong Wai Kuan & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan and other applications [2020] 10 MLJ 689, HC (refd)
Aminah bt Ahmad (suing in her personal capacity and on behalf of 56 retired members of the public services) v The Government of Malaysia & Anor [2022] 4 MLJ 74, CA (refd)
Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281; [2020] 1 CLJ 162, FC (folld)
Chan Kwai Chun v Lembaga Kelayakan [2002] 3 MLJ 550; [2002] 3 CLJ 231, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Innab Salil & Ors v Verve Suites Mont' Kiara Management Corp [2020] 12 MLJ 16; [2020] 10 CLJ 285, FC (refd)
Lim Yee Khei v Berjaya Times Square Sdn Bhd [2002] MLJU 635; [2003] 1 CLJ 527, HC (refd)
Nasri v Mesah [1971] 1 MLJ 32, FC (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)
Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and another appeal [2022] MLJU 354; [2022] 5 CLJ 251, CA (not folld)
PP v Dato' Yap Peng [1987] 2 MLJ 311, SC (folld)
Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others, Re [2005] 4 All ER 209, HL (folld)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (folld)
Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor [2016] 5 MLJ 1, FC (refd)
Toh Tiam Cheow & Ors v Berjaya Times Square Sdn Bhd [2002] MLJU 120; [2002] 4 CLJ 301, HC (refd)
UE E&C Sanjia (M) Sdn Bhd v Lee Jeng Yuh & Anor and another appeal [2021] 6 MLJ 864, CA (refd)

Legislation referred to

Criminal Procedure Code s 417
Housing Development (Control and Licensing) Act 1966 s 16A
Housing Development (Control and Licensing) Regulations 1989 regs 11(3), 12, Schedule H

Land Acquisition Act 1960 s 40D
Limitation Act 1953 s 6, 6(1)(a)
Rules of Court 2012 O 14, O 18 r 19(1), O 53
Strata Management Act 2013

Appeal from: Writ No WA-22NCVC-507–08 of 2020 (High Court, Shah Alam)

Wong Renn Xin (KL Wong) for the appellant.
Lai Chee Hoe (with Ooi Xin Yi) (Chee Hoe & Assoc) for the respondent.

Mohd Nazlan JCA:

INTRODUCTION

[1] These are two related interlocutory appeals. One is an appeal against the dismissal of the appellant's summary judgment application whilst the other was in relation to an appeal against the striking out of the appellant's suit. Both concerned the claim by the appellant purchaser for damages for late delivery of vacant possession, beyond the statutorily stipulated period, despite an extension of time having been obtained by the respondent developer.

[2] Like in the High Court, these were heard together before us where at the conclusion of the hearing which was conducted by way of a remote communication technology via *Zoom* we found for the appellant and allowed both appeals, set aside the decision of the High Court, and highlighted the main grounds for our decisions These grounds of judgment contain the full reasons for the same.

KEY BACKGROUND FACTS

[3] The appellant is the owner of a unit in a property development project known as the Sentral Residences which was purchased from the respondent company as the developer of the project at RM2,168,000, pursuant to a sale and purchase agreement ('the SPA') entered into on 18 July 2012. The Sentral Residences was a mixed development project, comprising two tower of service apartments and had been described as a mega township project in Kuala Lumpur.

[4] Under the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations'), which was made pursuant to the Housing Development (Control and Licensing) Act 1966 ('the HDA'), specifically on the provision concerning the statutory sale and purchase agreement prescribed under Schedule H to the Regulations, where in respect of stratified properties, a developer like the respondent is required to deliver vacant possession of the

parcels and to complete the common facilities of the residential development within 36 months. Failure on the part of the developer entitles the purchasers to be paid by the developer liquidated damages.

[5] Given the complexity and magnitude of the development of the project in the instant case, some 18 months prior to the execution of the SPA with the appellant and other purchasers, the respondent developer on 16 December 2010 had obtained an extension of time under the regulations to complete the project, from the statutorily prescribed period of 36 months under the regulations, to an extended period of 54 months.

[6] This extension was granted by the Housing Controller of the Ministry of Urban Wellbeing, Housing and Local Government under reg 11(3) of the Regulations. This extended completion period of 54 months was known to the purchasers and accordingly reflected in cll 25 and 27 of the SPA upon execution, including with the appellant on 18 July 2012.

[7] There can therefore be no dispute that the prescribed period of 54 months for delivery was clearly reflected in cll 25 and 27 of the SPA, as follows:

> 25 Time for delivery of Vacant Possession
>
> (1) Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in Clause 26 within fifty-four (54) calendar months from the date of this Agreement.
>
> (2) If the Vendor fails to deliver vacant possession in the manner stipulated in Clause 26 within the time stipulated in sub-clause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the expiry date of the delivery of vacant possession in sub-clause (1) until the date the Purchaser takes vacant possession of the said Parcel. Such liquidated damages shall be paid immediately upon the date the Purchaser takes vacant possession of the said Parcel.
>
> (3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.
>
> 27 Completion of common facilities
>
> (1) The common facilities serving the said housing development shall be completed by the Vendor within fifty-four (54) calendar months from the date of this Agreement. The Vendor's architect shall certify the date of completion of the common facilities
>
> (2) If the Vendor fails to complete the common facilities in time the Vendor shall pay immediately to the Purchaser liquidated damages to be

calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centrum (20%) of the purchase price.

(3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Vendor completes the common facilities

[8] On 25 January 2017, the respondent gave written notice to the appellant on the issuance of the certificate of completion and compliance and on its readiness to deliver vacant possession of the unit to the appellant. The 54-month period from the date of the SPA expired on 17 January 2017. Vacant possession of the unit in this case was therefore deemed delivered slightly later on 8 February 2017.

HIGH COURT DECISION

[9] More than three years later though, on 21 August 2020, the appellant filed a suit against the respondent at the High Court to claim liquidated ascertained damages ('LAD') amounting to RM392,021.92 for late delivery of vacant possession. The appellant now contended that the last date to deliver vacant possession under the SPA should have been on 17 July 2015, which is based on the completion period of 36 months from the date of the SPA, as prescribed in the statutory form under Schedule H to the Regulations

[10] The appellant then filed an application for summary judgment (encl 5) under O 14 of the Rules of Court 2012 ('the RC 2012') whilst the respondent reacted by applying for the suit be struck out (in encl 20) under O 18 r 19(1) of the RC 2012. The learned High Court judge as mentioned heard the two applications together and decided to refuse the summary judgment application but allow the appellant's suit to be struck out. The appellant thus filed an appeal against these two decisions The appeals are now before us

PRINCIPLES OF APPELLATE INTERVENTION

[11] We should first remind ourselves that the central feature of appellate intervention is well-established. It is to ascertain whether or not the trial court had arrived at its decision or finding correctly on the evidence and on the basis of the governing law. The Federal Court in the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 held as follows:

> [14] In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court.

Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

[12] In the leading case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 the Federal Court affirmed with unmistakable clarity that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle.

[13] This important principle involves a number of circumstances, but must necessarily extend to situations where it can be shown that the impugned decision is vitiated with plain material errors, or where crucial evidence had been misconstrued, or where the trial judge had so manifestly not taken proper advantage of having seen and heard the witnesses or not properly analysed the entirety of the evidence before him, or where a decision was arrived at without adequate judicial appreciation of the evidence such as to make it rationally unsupportable.

ANALYSIS AND FINDINGS OF THIS COURT

Extension is void

[14] Central to these appeals is the Federal Court decision in *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162. For present purposes, the most crucial ruling by the Federal Court in *Ang Ming Lee* is that reg 11(3) of the Regulations which confers on the Housing Controller the powers to waive or modify any provisions in the statutory contract in Schedule H to the Regulations is ultra vires its enabling legislation, the Housing Development (Control and Licensing) Act 1966. The Housing Controller has no power to waive or modify the 36-months period stipulated in the prescribed statutory contract of sale.

[15] The following passages from the judgment of Her Ladyship Tengku Maimun Tuan Mat CJ encapsulates the essence of the decision of the Federal Court:

[41] The legislative intent that the duties shall remain with the Minister, may be discerned from ss 11 and 12 of the Act. Under s 11, whilst the Controller is given the

power to investigate on the reason why a licensed housing developer is unable to meet his obligation to the purchasers, or is about to suspend his building operations or is carrying on his business detrimental to the interests of the purchaser, it is the Minister who is empowered to give directions and to take such other measures for purposes of safeguarding the interests of the purchasers and for carrying into effect the provisions of the Act. Likewise under s 12 which provides for the powers of the Minister to give general directions as he considers fit, to the licensed housing developer for purposes of ensuring compliance with the Act. Such directions, which shall be given in writing, are binding on the developer.

...

[55] Finally, on the third task. In the instant appeals, the Schedule H contract of sale prescribed by the regulations is to carry into effect the provisions of the Act, which is to protect the interests of the purchasers. The regulations made by the Minister must thus achieve the object of protecting the interests of the purchasers and not the interests of the developers And at the risk of repetition, the duty to protect the interests of the purchasers is entrusted to the Minister.

...

[56] By delegating the power, *vide* reg 11(3) to the Controller to waive or modify the prescribed terms and conditions of the sale of contract, it is now the Controller who has been entrusted to regulate the terms and conditions of the contract of sale. Further, by modifying the prescribed terms and conditions and by granting the developer the extension of time, the Controller has denied the purchasers' right to claim for LAD. This modification and the granting of extension of time to the developer, does not appear to us to protect or safeguard the purchasers but rather the developer and this militates the intention of Parliament.

[57] It was submitted for the developer that the purchasers would suffer greater hardship if the project is not completed as compared to not being able to claim for LAD. With respect, we fail to see the merit of this submission. If the developer fails to obtain an extension of time to deliver vacant possession, that in itself does not mean that the developer has failed to complete and hence, have abandoned the project. Whether or not the developer is granted an extension of time does not necessarily determine the fate of the project. The extension of time only determines payment of LAD. In this regard, we must not lose sight of the purchasers' obligations to pay for progress instalment to their respective housing financier and/or payment of rental to their landlord. It is a matter of balancing the commercial interest of a multi-million housing development company against the life-time loan commitment of a purchaser for a basic living necessity. As can be seen from the long line of authorities, it is the interests of the purchasers that prevail over that of the developer. We therefore hold that in allowing the Controller to waive or modify the terms and conditions of the contract of sale and in the process, denying the purchasers' right to claim for LAD as prescribed by the Minister under Schedule H, reg 11(3) does not comply with the description of the Regulations which is designed to protect the interests of the purchasers.

[16] The underlying and overriding intention of the Federal Court in *Ang*

Ming Lee as expressed in unmistakable fashion is to protect the interests of the purchasers, as the weaker parties in the sale and purchase agreements under the said Schedule H to the Regulations. The following is only one of the many emphasis on that point found in the judgment:

> [40] The Act being a social legislation designed to protect the house buyers, the interests of the purchasers shall be the paramount consideration against the developer. Parliament has entrusted the Minister to safeguard the interests of the purchasers and the Minister has prescribed the terms and conditions of the contract of sale as per Schedule H. We find no contrary indication in the language, scope or object of the Act that such duty to safeguard the interests of the purchasers may be delegated to some other authority.

[17] In another recent decision of the Federal Court in *Innab Salil & Ors v Verve Suites Mont' Kiara Management Corp* [2020] 12 MLJ 16; [2020] 10 CLJ 285, in holding the Strata Management Act 2013 to be a social legislation, Her Ladyship Tengku Maimun CJ referred to *Ang Ming Lee* and again stressed the point that the HDA as a social legislation was legislated to protect house buyers from the developers, as follows:

> [24] The determination of the above question would necessarily involve the wholesome interpretation of s 120 of the NLC *vis a vis* s 70 of the SMA 2013. But before we do that, we bear in mind the decision of *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162 ('Ang Ming Lee'). In *Ang Ming Lee*, based on a settled line of precedents, this court construed the Housing Development (Control and Licensing) Act 1966, which was passed to protect house buyers from developers, as a social legislation.
>
> [25] A statute is said to be a 'social legislation' when Parliament passes the statute for a beneficent reason with the intention to ease or facilitate the affairs of, or protect a certain section or group of persons (see *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369; [1996] 4 CLJ 687; *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141; [2009] 6 CLJ 232).
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> [26] It was passed to facilitate the affairs of strata living for the good of the community or owners of the strata title. Being social in nature, the provisions of the SMA 2013 which safeguard community interests ought to receive a liberal interpretation and not a restricted or rigid one. Accordingly, where two different interpretations are possible, it is the one which favours the interest of the community over the interest of the individual that is to be preferred. This is in line with the aforementioned decisions in *Ang Ming Lee* and *Hoh Kiang Ngan*.

[18] Now, a key argument raised by the respondent to resist this appeal as it did to oppose the appellant's summary judgment earlier at the High Court was that in *Ang Ming Lee*, the developer had already entered into the sale and purchase agreements with the purchasers of the condominium units which provided that the delivery of the units was 36 months from the date of the

agreement, in line with Schedule H of the Regulations. It was in that case only subsequently, without reg 11(3) the knowledge of the purchasers, that the developer applied to the Housing Controller of the Ministry for an extension of time, pursuant to of the Regulations. An extension was in *Ang Ming Lee* said to have been eventually granted by the Minister on appeal pursuant to reg 12 after it was initially refused by the Housing Controller.

[19] The sale and purchase agreements in *Ang Ming Lee* were then amended without the consent of the purchasers being obtained, denying their right to be heard, and depriving them the rights to claim for liquidated ascertained damages. Thus, the application for the extension of time by the developer in *Ang Ming Lee*, unlike in the instant case, was made *after* the agreements had been signed by the purchasers in which the initial completion date of the agreements was contracted to be 36 months in accordance with Schedule H.

[20] In plain contrast, the respondent in the instant case before us had, as mentioned earlier, before commencing the works, and *prior to* the entry of the SPAs with the purchasers such as the appellant, applied to the Housing Controller and obtained the requisite extension, for the construction period being extended from 36 months to 54 months

[21] We cannot accept this contention. For clearly, it matters not that the extension was granted after the sale and purchase agreements had been signed with the purchasers, like in *Ang Ming Lee*, or prior to, like in the instant case. As reg 11(3) is ultra vires, the Housing Controller has simply and absolutely no power to give any extension or to amend the statutory contract, such that it is wholly inconsequential that the extension in this case was obtained before the execution of the SPA, whatever the background.

[22] This court is in this respect bound by the doctrine of stare decisis to follow *Ang Ming Lee*. The extension of time by 18 months granted by the Housing Controller pursuant to reg 11(3) of the Regulations in the instant appeals is not valid since reg 11(3) itself is ruled to be ultra vires. It therefore must necessarily follow that the amendment made to the statutory contract to cll 25 and 27 of Schedule H — from 36 months to 54 months — on the basis of the extension allowed by the Housing Controller under reg 11(3) in this case is also void and of no effect.

[23] As such, the learned High Court judge's finding that the prescribed period of 36 months is not a rigid number because the regulations provide for an extension of time under reg 11(3) is plainly erroneous. For the same reason that reg 11(3), being the basis of the extension granted by the Housing Controller is ultra vires and therefore void, the other findings of the learned High Court judge that appellant did not object or appeal to the Ministry on the

extension, and that there were no amendments made to the completion period after the parties had signed the SPA, unlike in the case of *Ang Ming Lee*, and that parties are bound by the terms of the SPA executed between them are all irrelevant.

[24] This important point does not give rise to any triable issue.

Estoppel not applicable

[25] We observe that the respondent had in fact already paid to the appellant certain LAD in the sum of RM13,067.40 for the late delivery of vacant possession in accordance with the terms of the SPA on the basis of the extended period. The appellant had even signed a letter dated 7 March 2017 and undertaken to waive any further claims against the respondent. The learned High Court judge agreed with the respondent that the appellant was therefore estopped from denying what had been agreed between them.

[26] We disagree. It is settled law that an ultra vires act, such as the extension granted by the Housing Controller under reg 11(3) cannot be legitimised through estoppel, waiver or agreement between parties. The doctrine of estoppel does not therefore apply against a statute or statutory agreement such as in the instant case which revolves around the clauses in a statutory contract as prescribed in Schedule H to the Regulations. The principle of waiver or estoppel is in other words not applicable when reg 11(3) of the Regulations is ultra vires the HDA.

[27] The Federal Court in *Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor* [2016] 5 MLJ 1 also held that estoppel, being an equitable principle cannot operate to defeat clear statutory provisions of law. Ramly Ali FCJ delivering the judgment of the court in that case stated as follows:

> Estoppel
>
> [57] The issue of estoppel was also raised by the defendant. The defendant argued that the first plaintiff had accepted the defendant's payment of the full purchase price for all the 12 shop lots and never evinced any intention to refund the same. By that conduct, the defendant claimed that the first plaintiff was estopped from relying on s 293 of the CA as an instrument of fraud to prevent the defendant from receiving the properties which it had paid for.
>
> [58] Our view is that the plaintiffs' claim is based on statutory provisions of s 293 of the CA read together with s 52 of the BA. These statutory provisions, as we have discussed earlier, are clear and unambiguous estoppel, being an equitable principle cannot operate to defeat clear statutory provisions of law. This settled principle of law was adopted by Edgar Joseph Jr in *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352 when His Lordship ruled that: 'The defence of estoppel accordingly fails since there cannot be an

estoppel to evade the plain provisions of a statute, ... particularly when the non-compliance goes to the root of the thing'. A

[28] If allowed to operate in this case, an estoppel or waiver would also defeat the very purpose of the HDA which is a social legislation enacted to control housing development and protect the interests of purchasers. There is as such no basis to the contention that this is a triable issue. B

Action not statute-barred

C

[29] Two other important points raised in the proceedings below but not clearly addressed by the learned High Court judge are whether the action by the appellant is statute barred and whether he should have instituted a judicial review instead.

D

[30] We find that the appellant's right to claim LAD only arose on the date he accepted delivery of vacant possession of his property unit, consistent with cll 25(2) of the SPA which states as follows:

> For the avoidance of doubt, any cause of action to claim for liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel. E

[31] Here, the appellant is deemed to have taken delivery of vacant possession of his property in early February 2017. Accordingly, the appellant's cause of action to claim LAD accrued on that date. The six years limitation period under s 6(1)(a) of the Limitation Act 1953 would only expire in early February 2023. Since the instant suit was filed on 21 August 2020, which clearly is well within the limitation period, the appellant's claims are not barred by limitation. F

G

[32] We are mindful that a contrary conclusion on this issue has been arrived at by this court in a recent case of *Obata-Ambak Holdings Sdn Bhd v Prema Bonanza Sdn Bhd and another appeal* [2022] MLJU 354; [2022] 5 CLJ 251, to the effect that the essence of the pleaded case of the appellant is that the SPA had breached Schedule H to the Regulations when the period to deliver vacant possession was amended from 36 months to 54 months H

[33] It was contended that by the said amendment, the respondent had infringed the HDA and Schedule H to the Regulations, rendering the amendment invalid and not binding on the appellant. And the respondent would still be bound to deliver vacant possession within 36 months, as per Schedule H of the Regulations. This court in *Obata Ambak* thus stated: I

> [29] Therefore, in gist, on its pleaded case, the plaintiff's cause of action is that:

A

(i) that the SPAs were invalid at the time of signing, as the SPAs had failed to comply with the prescribed Schedule H; and

(ii) that the defendant has breached Schedule H of the HDR 1989, by amending the time for delivery of vacant possession from 36 months to 54 months.

B

[34] In other words, in light of *Obata Ambak*, it is contended by the respondent that here, the appellant is in fact challenging the validity of the amendment to cll 25 and 27 of the SPA, from the date of its execution. And because the contractual breach is the very amendment to these clauses, the appellant's cause of action runs from the date of the execution of the SPA, which in this case is 18 July 2012. In such event though, the appellant's claim would be barred by limitation, as the six-year period would have expired on 17 July 2018.

C

D

[35] It is nonetheless trite that a cause of action founded on a contract usually accrues on the date of its breach, or from the date when that right is infringed or when there is a threat of its infringement. The Federal Court in *Nasri v Mesah* [1971] 1 MLJ 32, in the judgment of Gill FCJ had this to say on the subject:

E

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown* (1888) 22 QBD 128 131). In *Reeves v Butcher* (1891) 2 QB 590 511 Lindley LJ said: 'This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland LR* 4 QB 509 511, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.
>
> In *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610 at p 617, Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field X in *Gibbs v Guild* 8 QBD 296 at p 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo's* case LR 57 IA 74). It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run'.

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H

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[36] In our view, where the contractual breach concerns a claim for LAD as pleaded in this case, we do not think it is correct to hold that the cause of action accrues on the date of the SPA, despite the contention that the breach occurred

when cll 25 and 27 were made to depart from Schedule H to the Regulations. We say so because of two principal reasons

[37] First, no liquidated damages could be claimed by the appellant at that early stage as it could certainly not as yet be ascertained before delivery of vacant possession. The High Court in *Toh Tiam Cheow & Ors v Berjaya Times Square Sdn Bhd* [2002] MLJU 120; [2002] 4 CLJ 301, in the judgment of Arifin Zakaria J (later Chief Justice) plainly held as follows:

> It would appear that based on cl 22(2) liquidated damages only become due and payable at the date of the delivery of vacant possession. Thus, prior to that no liquidated damages could be claimed by the plaintiffs as it could not as yet be ascertained.

(See also *Lim Yee Khei v Berjaya Times Square Sdn Bhd* [2002] MLJU 635; [2003] 1 CLJ 527 which applied *Toh Tiam Cheow*).

[38] In other words, since the appellant is suing for liquidated damages for late delivery of vacant possession and late completion of common facilities it cannot be said that his cause of action to sue arises on the day the SPA was executed. Plainly, for the purpose of suing for LAD for late delivery of vacant possession and late completion of common facilities the appellant's cause of action against the respondent is not triggered until and unless the date for delivery of vacant possession and date for completion of common facilities has passed.

[39] Secondly, if limitation starts to run on the date of the SPA, but that a LAD claim — should there be a delay — could only be made much later on the expiry of the 36 months, the first three years of the limitation period would for all intents and purposes be wholly illusory.

[40] Accordingly, with the greatest of respect we are therefore not minded to follow the decision in *Obata Ambak* on this point only as we are of the view that the limitation period starts to run from the expiry of the 36 months. On the facts of this case the appellant's suit is well within time. The appellant's claims are not time-barred under s 6 of the Limitation Act 1953. There is no triable issue here.

Writ action is correct mode

[41] In respect of the issue of whether this writ action is the wrong mode of proceedings, we do not agree that the action must be instituted by way of judicial review as mandated under O 53 of the Rules of Court 2012. This is because although the appellant is questioning the validity of the extension

which was an administrative decision granted by the Housing Controller which falls within the remit of public law, the Federal Court in *Ang Ming Lee* has made it crystal clear that any extension allowed by the Housing Controller under reg 11(3) is void. It is already settled that any extension under reg 11(3) is null and void.

[42] Neither is the appellant seeking any reliefs against the Minister or the Housing Controller. There is therefore no necessity to include the Minister of Urban Wellbeing, Housing and Local Government and the Housing Controller to this suit.

[43] In any event the pleaded case of the appellant essentially concerned the contractual breach of the SPA. It is not so much a challenge of an administrative decision. Instead it is about the validity of cll 25 and 27 of the SPA, and the breach thereof which gives rise to the respondent developer's obligation to pay LAD for failing to deliver the vacant possession and common facilities in accordance with the time stipulation as prescribed under the law.

[44] Furthermore, there is also no necessity for the appellant to seek to quash the extension decision by way of a certiorari in a judicial review since in the first place, a void decision is no decision at all (see the Court of Appeal case of *Chan Kwai Chun v Lembaga Kelayakan* [2002] 3 MLJ 550; [2002] 3 CLJ 231). The extension is void. There is no decision to challenge. The extension can be disregarded without the need for any judicial review proceedings to have it set aside. There is also no triable issue here.

No prospective overruling only

[45] One other important point raised by the appellant in his written submissions but not dealt with by the learned High Court judge is that *Ang Ming Lee* has retrospective effect, which thus enabled the appellant to make this LAD claim against the respondent.

[46] It is on this well-settled that if the verdict on fresh interpretation of the law does not come with any declaration as to whether the ruling should apply prospectively, then the general rule that all judgments of the courts apply retrospectively takes effect (see the decision of the Court of Appeal in *Abdillah bin Labo Khan v Public Prosecutor* [2002] 3 MLJ 298).

[47] This question was examined by the High Court in *Alvin Leong Wai Kuan & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan and other applications* [2020] 10 MLJ 689 which held that since the Federal Court in *Ang Ming Lee* has not expressly ruled that its decision can only have prospective effect, in accordance with the general rule, the judgment in

Ang Ming Lee has retrospective effect. A

[48] *Alvin Leong* also decided that there are no exceptional circumstances for the doctrine of prospective overruling to apply to the decision of *Ang Ming Lee*. On the contrary, as stated in a number of cases, including *Ang Ming Lee*, given that the object of the Regulations and the HDA is to protect a 'homebuyer' (as defined in s 16A of the HDA), it would be in the interest of purchasers for *Ang Ming Lee* to be given retrospective effect. B

[49] We are in this respect mindful of the decision of the Federal Court in the landmark case of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 where the ruling on the unconstitutionality of s 40D of the Land Acquisition Act 1960 was held to only apply prospectively. Similarly, in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 the Supreme Court gave prospective effect to its decision after taking into account that the decision that the former s 417 of the Criminal Procedure Code was unconstitutional, if applied retrospectively, would result in creating chaos. Recently also, this court has in *Aminah bt Ahmad (suing in her personal capacity and on behalf of 56 retired members of the public services) v The Government of Malaysia & Anor* [2022] 4 MLJ 74 held that in order to mitigate the adverse consequences and hardship that the decision of the court may have on the parties and pensioners as a whole, the decision was to have prospective effect. C D E

[50] Then there is also the decision of the House of Lords in *Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others* [2005] 4 All ER 209 which discussed this doctrine. Lord Nicholls said this: F

> [40] Instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law. There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be compelled to depart from the principles to the retrospective and prospective effect of court decisions. G H

[51] Lord Hope had this to say:

> [74] Where the future may lead us we cannot tell. So, like my noble and learned friend Lord Nicholls, I would not rule out the possibility that in wholly exceptionally case the interest of justice may require the House, in the context of a dispute about the state of the common law or even about the meaning or effect of a statute, to declare that its decision is not to operate retrospectively. I

[52] We were on the other hand referred by the respondent to the decision of

the High Court in *Alpine Return Sdn Bhd v Ng Hock Sing & Ors* [2021] MLJU 1923; [2022] 1 CLJ 120 where the developer argued that it would be unreasonably penalised by the retrospective ruling of *Ang Ming Lee* given that the developer had at the material time correctly adopted the procedure that had been set by the Ministry to secure the extension. It was also argued that the retrospective effect of a change in the law through *Ang Ming Lee* could have extreme, disruptive and unfair consequences on developers.

[53] We do not disagree that *Alpine Return* was factually similar to the instant case in one important respect. Like presently, there too, the extension was obtained well before the relevant agreements were signed and there was no dispute that the purchasers were well aware that the statutory completion period of 36 months had in that case been approved for extension to 60 months.

[54] And although it held that *Ang Ming Lee* applied retrospectively, the High Court in *Alpine Return* also made these observations:

> [76] However I am also mindful that the key consideration in *Ang Ming Lee* on the need of the purchasers as the aggrieved parties who needed the protection from the court is absent and irrelevant in the instant case. Here, both the plaintiff and the defendants were under the assumption that the Extension Letter was valid, not void or illegal when they executed the SPAs at that material time. The plaintiff had proceeded on and relied on the conduct of the purchasers, including the defendants and was of the belief that the time to deliver the vacant possession were agreed to be extended to 60 months and as such accordingly agreed to sell the parcels to the purchasers. As I have stated earlier, the plaintiff would never have otherwise agreed to sell the parcels to the purchasers at the agreed purchase price (discounted and with rebates) and to commence the construction works of the Project. In fact it would not be wrong to state that at all material times the plaintiff had acted as a responsible developer in making the application to amend the construction period of 36 months to 60 months in Schedule H before entering into the SPAs with the purchasers, including the defendants. There is also absolutely no ambiguity in the language of cll 25 and 27 of the SPAs.
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> [77] There was nothing untoward in the application for the Extension which was supported by the experts and consultants for the Project. The procedures to apply for the Extension is governed by the Ministry. At all material times, the plaintiff was merely complying with the procedures of the Ministry and the law as then prevailing including in reg 11(3) of the Regulations. Crucially in my view, there is no suggestion let alone evidence that the plaintiff at any material time had engaged in any illegality in the making of the application for the Extension then.
>
> [78] In contrast, in the other cases, there were elements of irregularity and illegality — on the part of the developers. In *Ang Ming Lee*, *Alvin Leong* and *Kok Chay Har* for example, applications for extension of time were made and approved after the relevant agreements had been signed with the purchasers without giving them the right to be heard on the extensions.

...

[83] I revert to the objective of the HDA to protect the weaker party which is the purchaser. I further observed that the meaning of social legislation was further explained by Her Ladyship Tengku Maimun Tuan Mat CJ in *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441 as follows:

...

[84] In *PJD Regency* the developer failed to deliver vacant possession within the time stipulated in the statutory sale and purchase agreement, and the Federal Court held that the calculation of the LAD begins from the date of payment of the booking fee and not from the date of the statutory agreement. This is fortified by the HDA and the regulations being social legislation. And in the interpretation of a social legislation, the court must give effect to the intention of Parliament and not the intention of parties. Otherwise, the attempt by the legislature to level the playing field by mitigating the inequality of bargaining power would be rendered illusory. Again, here, that the HDA is a social legislation was emphasised because it needed to be in the face of a breach by the developer. In contradistinction, no irregularity can be accused against the plaintiff in the instant case before me.

[85] Not only do these cases involve some form of illegality, default of irregularity on the part of the developers, which is absent in the instant case, but that It is quite evident and it does appear that unlike the purchasers in *Ang Ming Lee* and *Loh Tina* the defendants in the instant case are resorting to the authority of *Ang Ming Lee* to unjustly enrich themselves despite the fact that the defendants were expecting the completion of the Project within 60 months and they did receive the vacant possession of the parcels within the expected and agreed period of 60 months in accordance with the SPAs, without any protest and objection, and on purchase terms predicated on the said period of 60 months.

[55] We do not disagree that there may be some basis to the contention that there could in the instant case be some exceptional circumstances (which did not arise in *Ang Ming Lee*) that would justify the decision in *Ang Ming Lee* being applied only prospectively in other cases.

[56] Nevertheless we must accept the important point that the Federal Court in *Ang Ming Lee* did not pronounce expressly or by implication that its decision must have prospective effect on all the letters of extension of time which had been previously issued under the impugned provision of the regulations to the developers.

[57] In our view therefore, from these leading cases such as *Semenyih Jaya*, *Dato' Yap Peng* and *National Westminster Bank plc* and as correctly held by *Alpine Return*, the application of the doctrine of prospective overruling must be

declared by the court which actually decided on the case which resulted in the clarification or the change in the law. It would not be right for another court, what more if inferior in status such as the High Court below or this court, vis a vis the Federal Court in *Ang Ming Lee* to provide its ruling on whether that decision of the Apex Court should be applied prospectively or otherwise. As weighty constitutional and legal issues of major and wide importance are often ultimately heard at the highest court, it is also for the Apex Court that should ordinarily decide whether or not its ruling that resulted in the change should be applied prospectively instead of the usual retroactive application. That was indeed the pronouncement made by the Supreme Court in *Yap Peng* and the Federal Court in *Semenyih Jaya*.

[58] At the same time it bears emphasis that this court has also in a number of other decisions involving the same Sentral Residences project made the clear ruling that as reg 11(3) has been ruled by *Ang Ming Lee* to be ultra vires, the extension that was allowed in pursuance of the said provision must be void.

[59] To the same effect, this court in another recent decision in *UE E&C Sanjia (M) Sdn Bhd v Lee Jeng Yuh & Anor and another appeal* [2021] 6 MLJ 864 has also made the following findings:

> [36] We disagree with the defendant on this issue. The decision of the Federal Court in *Ang Ming Lee* is clear that the Housing Controller has no power whatsoever to waive and modify the terms and conditions of the scheduled agreement in the first place. Therefore, the issue of whether the approval is obtained before or after the SPAs have been executed is not relevant.
>
> ...
>
> [38] Next, there is nothing expressly mentioned in *Ang Ming Lee* regarding the prospectivity of the said decision. Therefore, the decision of the Federal Court *Ang Ming Lee* operates retrospectively (see *Public Prosecutor v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 (FC) and *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 3 MLJ 561; [2017] 5 CLJ 526 (FC)).

[60] As such, in the absence of any further pronouncement by the Federal Court, the ruling by the Federal Court in *Ang Ming Lee* on reg 11(3) of the Regulations being void is to be applied retrospectively. This is also not a triable issue.

CONCLUSION

[61] In view of the reasons as discussed above, we hold that the decision of the High Court dismissing the summary judgment application against the respondent and allowing the striking out of the appellant's claim to be in error, which therefore warrants appellate intervention.

[62] There are no triable issues to deny summary judgment under O 14 of the RC 2012 and the suit of the appellant is certainly not obviously unsustainable to warrant it to be struck out summarily under O 18 r 19(1) of the RC 2012.

[63] As such, both appeals are allowed such that we set aside the orders of the High Court and direct that the summary judgment application against the respondent (in encl 5) be allowed, and the striking out application against the appellant's claim (encl 20) be dismissed.

[64] We also order costs for the appellant.

Appeals allowed and High Court's decision set aside.

Reported by Ashok Kumar